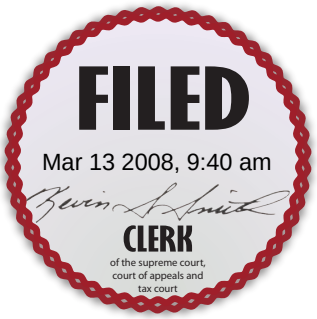

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IN THE
COURT OF APPEALS OF INDIANA

JAMES D. HUTTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A04-0707-CR-421
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0505-FA-22

March 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

James D. Hutton appeals his conviction of Rape[1] and Criminal Deviate Conduct,[2] both as class B felonies, and Confinement,[3] a class D felony. Upon appeal, Hutton challenges the sufficiency of the evidence supporting the convictions.

We affirm.

The facts favorable to the convictions are that on May 4, 2005, twenty-two-year-old M.H. went to the home of Hutton – her father – in order to pick up a check. While she was standing at the door, he pulled her inside and told her she was going to have to stop telling people about the fact that he had been sexual active with M.H. for the preceding four years, during which time she had lived with him.[4] Hutton bound M.H.'s hands with plastic zip ties and gagged her. When Hutton moved M.H.'s truck into his garage, M.H. attempted to leave, but Hutton prevented her from doing so. When he returned, Hutton bound M.H.'s feet with a nylon rope and tied her hands to her feet.

Hutton then moved M.H. to his bedroom, removed the rope around her legs, and removed her shoes and pants. He cut off her wrist restraints, cutting her wrists in the process. He removed the rest of her clothes and told her to sit down on his bed. He retrieved a bag of sex toys and instructed her to lie on her back. He told her that he was

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[1] Ind. Code Ann. § 35-42-4-1 (West, PREMISE through 2007 1st Regular Sess.).

[2] I.C. § 35-42-4-2 (West, PREMISE through 2007 1st Regular Sess.).

[3] I.C. § 35-42-3-3 (West, PREMISE through 2007 1st Regular Sess.).

[4] M.H. testified at trial that Hutton had raped her 7-10 times in the years she lived with him, prior to the instant incident.

going to take Polaroid photos of her engaging in what would appear to be voluntary solo sex acts and that he would show the photos to other people "if [M.H.] told anybody else what happened." *Transcript* at 63. Hutton was crying and her wrist was bleeding. Hutton gave her a handkerchief and instructed her to wipe away the blood and the tears, and to smile. Hutton applied Vaseline to M.H.'s vagina, inserted a vibrator into her vagina, and took a photograph. Hutton thereafter took several photographs of M.H. holding onto various sex toys that he had inserted into her vagina.

At some point, Hutton grabbed the back of M.H.'s head and forced her to perform fellatio on him. He then forced her to lie on her back and inserted his penis into her vagina. M.H. asked him to stop and asked if he was going to kill her. He responded by saying, "this isn't so bad, is it." *Id*. at 64. A short time later, Hutton ejaculated on M.H.'s stomach. Hutton told M.H. to clean herself and she complied. She told him she was expected at a friend's house for dinner and that they would be worried if she did not show up. He told her she could leave but that she had to come back. He told her he did not want her dating anyone and instructed her to bring clothes with her when she returned because the two "were going to start over." *Id*. M.H. agreed.

When she left, however, she drove directly to the New Chicago Police Department and reported what had happened. When she arrived there, officers noted that she obviously "had been crying" and appeared "very upset". *Id*. at 144. Officers documented wounds to her hands and wrists and transported her to a nearby hospital for examination. Hospital personnel administered a sexual assault kit and collected samples.

During the examination, a nurse noted that M.H.'s pubic hair "was exceptionally greasy, not normal pubic hair. It had almost a Vaseline feel to it, very greasy, the entire external genitalia, very greasy feel." *Id.* at 178.

Police officers executed a search warrant the next day at Hutton's residence. They recovered a Walgreens bag with a receipt for Polaroid film from May 4, 2005, a Polaroid camera with no film in it, and a box of Polaroid film with one cartridge missing. They also noted there was a Vaseline jar lid sitting on a safe in Hutton's bedroom, that the bed in that bedroom had new sheets on it, and that there was a set of sheets in his washing machine. They collected a comforter and a bed sheet.

All of the evidence was later submitted to the Indiana State Police Laboratory. The comforter contained DNA from both Hutton and M.H. Cervical swabs taken from M.H. tested presumptively positive for seminal fluid and sperm, but DNA was not present. M.H.'s t-shirt and jeans tested presumptively positive for seminal fluid, and Hutton's DNA was found on the t-shirt.

Hutton was charged with rape and criminal deviate conduct as class A felonies, rape and criminal deviate conduct as class B felonies, incest and battery as class C felonies, and confinement and intimidation as class D felonies. A jury trial was conducted on May 7-10, 2007. Following the State's case-in-chief, the trial court entered directed verdicts in Hutton's favor on the class A felony rape and criminal deviate conduct charges and the intimidation charge. At the conclusion of trial, the jury found Hutton not guilty of battery, but guilty of the remaining charges. At sentencing, the trial

court vacated the incest charge, and entered judgment of conviction on the rape and criminal deviate conduct charges as class B felonies and confinement as a class D felony. Hutton received a twenty-four-year, executed sentence.

Hutton contends the evidence was not sufficient to support his convictions. When considering a challenge to the sufficiency of evidence supporting a conviction, we neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). This review "respects 'the [fact-finder]'s exclusive province to weigh conflicting evidence.'" *Id*. at 126 (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). Considering only the probative evidence and reasonable inferences supporting the verdict, we must affirm "'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *McHenry v. State*, 820 N.E.2d at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

The essence of Hutton's challenge to the sufficiency of the evidence is reflected in the following contention: "The testimony of the victim was so improbable as to be beyond belief." *Appellant's Brief* at 5. Although not invoking it by name, Hutton attacks his convictions via the incredible dubiosity rule. We apply this rule impinging upon a jury's function to judge the credibility of a witness only in a particular circumstance. Our Supreme Court has explained the rule and its application as follows:

> If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted

> inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Fajardo v. State, 859 N.E.2d 1201, 1208 (Ind. 2007) (quoting *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002)).

Hutton contends the incredible dubiosity rule applies here because M.H.'s story basically made no sense. If she was raped on multiple occasions by her father, Hutton asks, why would she voluntarily stay with him when "[t]here was family around"? *Appellant's Brief* at 7. According to Hutton, "nobody would have stayed in her father's allegations [sic] if they were being sexually attacked." *Id*. Turning to the allegations involved in this case, Hutton claims it is incredible and unworthy of belief that M.H. would have returned to "a house where … she had been raped by her father eight times." *Id*.

We observe first that although it might seem counter-intuitive to suppose that someone would voluntarily continue to reside in a house where they had been the victim of serial abuse, the psychologically complicated dynamics of parent-child relationships and abuser-victim relationships can cause someone in the circumstances in which M.H. found herself to remain with the abuser and endure the abuse. Moreover, we note that M.H.'s testimony was not uncorroborated. Law enforcement officials and medical caretakers who encountered M.H. shortly after the incident described her as scared, upset, and nervous. She gave a detailed account of the attack, and that account was

corroborated by, among other things, (1) her wrist injuries, (2) the greasy substance found on her pubic hair during the sexual assault examination, (3) the seminal fluid discovered on M.H.'s t-shirt and cervical swabs, (4) the presence of Hutton's DNA on M.H.'s t-shirt and, along with M.H.'s DNA, on the comforter, (5) the discovery of a Polaroid camera and a film box missing one package of film, (6) the lid from a jar of Vaseline found in Hutton's bedroom, and (7) the fact that by the next day, the sheets on his bed had been stripped and washed, and replaced with new sheets. In short, there was evidence to corroborate M.H.'s testimony; therefore, the incredible dubiosity rule does not apply. *See Buckner v. State*, 857 N.E.2d 1011 (Ind. Ct. App. 2006). The evidence was sufficient to support the convictions.

Judgment affirmed.

ROBB, J., and MATHIAS, J., concur.